No. 87-1200

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY, et al.,

Petitioner,

v.

AUBURN UNIVERSITY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT AUBURN UNIVERSITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the review of the Court of Appeals' decision by writ of certiorari is appropriate given the fact that the key element of the Court of Appeals' decision, the dismissal of the plaintiffs' claims under Title VI of the Civil Rights Act of 1964, is not challenged by the Petition?

2. Whether the Court of Appeals' decision to disqualify the trial judge is correct and in accord with the law of other circuits?

3. Whether the Court of Appeals was correct in holding that Alabama State University and Alabama A&M University, as instrumentalities of state government, had no legally cognizable right, and therefore no standing, under the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983 or Title VI of the Civil Rights Act of 1964 to assert their claims in the district court?

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STATEMENT OF THE CASE

Respondent Auburn University cannot accept the Petitioners' statement of the case because of omissions and misstatements that are significant to this Petition.

The involved history of this action since its filing in July, 1983, includes two prior unsuccessful certiorari petitions (No. 85-1878 and No. 86-749). The "standing" issue raised in this Petition was previously raised in No. 86-749,[1] as to which certiorari was denied, — U.S. —, 107 S. Ct. 1287, 94 L.Ed.2d 144 (Feb. 23, 1987).

The trial judge was disqualified on three independent grounds that were based on the record and substantiated by judicially cognizable, published legislative journals. None of these grounds relate to the race of the trial judge.

The Petitioners' statement of the case significantly mischaracterizes the decision of the United States Court of Appeals for the Eleventh Circuit. The Petitioners neglect to mention that the Court of Appeals, in its *per curiam* opinion by Judge Vance and Judge Kravitch and former Chief Judge John Brown of the United States Court of Appeals for the Fifth Circuit, dismissed the Complaint of the United States and the Knight Petitioners' claims under Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d, because the theory asserted

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[1] In a prior decision authored by Judge Frank M. Johnson of the Eleventh Circuit Court of Appeals, 791 F.2d 1450 (11th Cir. 1986), it was held that Alabama State University (ASU) had no legally cognizable right, and therefore standing, to assert the claims raised in the district court. The subsequent *per curiam* opinion of Judges Vance, Kravitch and Brown extended this holding to Alabama A&M University (A&M).

by the United States and the Petitioners was inconsistent with the decision of this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), as well as numerous lower court decisions.

The Court of Appeals remanded the case to the Chief Judge of the Northern District of Alabama with instructions (1) that the Complaint of the United States be dismissed without prejudice, (2) that the Title VI claim of the Knight Intervenors be dismissed without prejudice, and (3) that the remaining claims be assigned to himself or another judge for a new trial or other proceedings not inconsistent with the opinion, 828 F.2d 1552, Petitioners' App. at 40a. The "heart" of the decision by the Court of Appeals is not (as Petitioners claim) the recusal issue, but the dismissal of the Title VI claims.

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SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied, because (1) dismissal of the Title VI claims required that the District Court order be vacated, (2) the decision concerning recusal is correct and consistent with the law in other circuits and (3) the "standing" issue presents no substantial question.

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ARGUMENT

I. THE DISMISSAL OF TITLE VI CLAIMS, UNCHALLENGED BY THE PETITION, MAKES CERTIORARI INAPPROPRIATE.

The Petition focuses on the recusal issue, as if reversal of the holding of the Court of Appeals as to recusal would reinstate the District Court's December, 1985, order, and promptly effect substantial relief in favor of the Petitioners. That is simply not the case.

The Court of Appeals reversed the decision of the District Court, and remanded for dismissal of Title VI claims of all plaintiffs, because the Title VI claims were brought on an untenable "broad systemic approach" rather than program-specific liability under Title VI, *see* Petitioners' App. at 29a-39a.[2] The Court of Appeals rejected that theory as inconsistent with the decision of this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), as well as with the decision of the predecessor Fifth Circuit in *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969) (Petitioners' App. at 31a-39a). Thus, proceedings in the case are required to begin again, notwithstanding the substantial record and lengthy trial to which the Petition alludes.

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[2] The United States admitted, among other things, that the Title VI compliance investigation which preceded this suit was not program-specific, and that the Office for Civil Rights of the U.S. Department of Education ("OCR") had not identified any person denied the benefits of, or participation in, any federally-funded program. Nor did OCR find any "institutional" violation by Auburn or any other defendant college or university.

The Petition does not seek certiorari as to the dismissal of the Title VI claims. Therefore, the recusal and "standing" questions raised by the Petition should be viewed in the context of a case in which the Complaint has been dismissed without prejudice, and subsequent proceedings will take place in the District Court on a different theory, with different proof, regardless of the Court's disposition of those issues.

II. THE COURT OF APPEALS' DECISION TO DISQUALIFY THE TRIAL JUDGE PRESENTS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

A. The Grounds For The Decision Were Asserted In A Timely Manner.

The Petition raises several questions with respect to the disqualification of the trial judge. Principal among these is that Auburn waived certain grounds for recusal by not presenting them in a timely fashion. In so arguing, the Petition confuses the holding of Judges Vance, Kravitch and Brown concerning disqualification based on extrajudicial knowledge of disputed evidentiary facts under 28 U.S.C. § 455(b)(1) with questions of waiver of grounds under 28 U.S.C. § 455(a).

In this case, Auburn's motion for disqualification, filed on September 6, 1983, was timely. Auburn's initial motion raised three grounds for disqualification under 28 U.S.C. § 144 as well as under 28 U.S.C. § 455(a) and (b)(1). The grounds asserted from the outset included the trial judge's extrajudicial knowledge of disputed matters of fact, with specific reference to matters involved in *Lee, et al. v. Macon County Board of Education, et al.* (herein-

after *Lee v. Macon*), a state-wide education desegregation case involving several state colleges as well as elementary and secondary schools. The trial judge initially refused to consider affidavits filed under 28 U.S.C. § 144, and denied the motion as to 28 U.S.C. § 455 on all grounds asserted.

Auburn successfully petitioned for a writ of mandamus to require consideration of disqualification, and a senior district judge of the Northern District of Alabama ruled that the trial judge should be disqualified. That judge recused himself and withdrew his opinion. Subsequently, a senior circuit judge, sitting by designation, ruled that the trial judge should not be disqualified, and denied Auburn's request for permission to file an interlocutory appeal under 28 U.S.C. § 1292(b). The case then proceeded through discovery and trial.

On appeal, Auburn again raised the disqualification issue, including two grounds asserted in the District Court as well as two additional matters that were actually relied upon in the District Court's opinion on the merits, as to which the trial judge had personal knowledge of disputed evidentiary facts—the trial judge's active participation in the selection of Petitioner ASU's Board of Trustees and his co-sponsorship of an appropriation bill to provide facilities for Petitioner A&M.

The Court of Appeals opined that the trial judge should be disqualified under § 455(b)(1) because he had personal knowledge of disputed evidentiary facts. The Court of Appeals did not repudiate the concept of timeliness under § 455(b)(1), but correctly held that in the circumstances of this case, those matters could properly

be considered on appeal, 828 F.2d 1544, n.49, Petitioners' App. at 23a-24a.

No case cited in the Petition holds that grounds for recusal under § 455(b) may be waived, nor does any case hold that grounds under § 455(a) may be waived unless the trial judge has first disclosed the facts underlying the motion on the record. No case holding a disqualification motion untimely involved a motion filed as early as two months after the Complaint was filed and almost two years before the trial began, nor did any case hold that additional matters may not be raised in support of a timely motion for disqualification. To the contrary, the Court of Appeals for the Ninth Circuit has held that the filing of a motion under 28 U.S.C. § 144 "should also prompt the judge to whom the motion is directed to determine independently whether all the circumstances call for recusal under the self-enforcing provisions of section 455(a) and (b)(1) . . . ." *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980). The failure of the trial judge to recuse himself under such circumstances, even in the absence of reference to specific facts supporting recusal, is then reviewable on appeal. *See Sibla*, 624 F.2d at 868; *see also Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).

The Petitioners' assertion that there is a conflict among the circuits as to the concept of timeliness and as to whether an appellate court is precluded from considering the trial judge's extrajudicial knowledge of matters that were not first raised in the District Court is simply not correct.

The plain language of 28 U.S.C. § 455(e) is that grounds for recusal under § 455(b), such as those raised by Respondents, may not be waived under any circumstances, and that grounds for recusal under § 455(a) may be waived only after the trial judge's *disclosure on the record* of the grounds for disqualification. The matters asserted by Auburn as grounds for disqualification under § 455(b)(2) could not have been waived under any circumstances. *See Potashnick*, 609 F.2d at 1114. Similarly, they could not have been waived under § 455(a)(1) absent the trial judge's disclosure on the record of his prior involvement with matters in dispute in this litigation. *Id.*

Delesdernier v. Porterie, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982), cited by Petitioners, does not support the Petition. There, the Court expressly joined the Second and Ninth Circuits in holding that "some sort of timeliness requirement is appropriate for the present version of § 455." In that case, however, the trial judge had given "a full and fair disclosure of his situation as regards to Defendants Porterie and Duke, and indeed described his acquaintance with them in painstaking detail." Specifically, the Court noted that "waiver is not possible if the situation falls within one of the specific categories listed in § 455(b)" and cited *Potashnick* for the proposition that matters supporting a disqualification motion discovered after the trial are properly raised for the first time on appeal. 666 F.2d at 122-123, n.4.

The fundamental distinction between the cases cited by the Petitioners and the case *sub judice* is that in the former the movants were made aware of the grounds for disqualification by the trial judge, and in most cases in-

vited to request his disqualification, but did not do so until an adverse decision on the merits had been reached. In the present case, Respondents moved for the trial judge's disqualification pursuant to §§ 144 and 455 almost two years prior to trial, pursued the matter on petition for writ of mandamus to the Eleventh Circuit Court of Appeals and later requested that the matter be certified for interlocutory appeal, but were never informed by the trial judge of his extrajudicial involvement with disputed evidentiary facts. Despite the issue of disqualification being raised, the trial court never disclosed nor invited inquiry into these matters, even though the issues in which he had been involved were issues of serious dispute throughout the litigation. Under such circumstances Respondents cannot be said to have waived either of these grounds.[3]

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[3] The Court of Appeals' decision to entertain the disqualification issue without further proceedings in the district court does not conflict with other circuits. The Court of Appeals certainly had jurisdiction to rule on recusal issues in the first instance, see *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980); *Potashnick v. Port City Construction Co., supra*. The other courts that have remanded for further proceedings prior to making such a decision have done so on the basis that, in their opinion, the record before them was not complete as to the issues involved. In the present case, the record developed in the district court is clear as to the factual matters in dispute. The newspaper article describing the trial judge and the ASU trustee appointments was produced by the United States in discovery after the initial recusal proceedings, and it was in the record as an exhibit to two subsequent depositions. The trial judge's involvement as attorney for plaintiffs in *Lee v. Macon* had been fully developed in the district court. Unchallenged public records confirmed the trial judge's involvement in the trustee confirmation process and his sponsorship of the A&M facilities bill. No further proceedings were necessary.

B. The Court Of Appeals' Decision Was Correct On The Merits.

The Petitioners' allegation that the decision of Judges Vance, Kravitch and Brown on disqualification was made on the basis of race is a gross mischaracterization of the *per curiam* opinion. Neither Respondent's recusal argument in the Court of Appeals nor the Court of Appeals' decision was based on considerations of race. Rather, the Court of Appeals correctly held under § 455(b) that "[t]o permit Judge Clemon to decide a case in which he had extrajudicial, personal knowledge of disputed facts would be contrary to the express language of the statute, as well as the case law." Petitioners' App. at 27a-28a.

Petitioners' argument that Judge Clemon's involvement in the confirmation of a black majority on the ASU Board of Trustees and in appropriating funds to A&M to correct alleged inequalities in its facilities do not warrant disqualification because they are "two of the most common functions of a state legislator," overlooks the importance of those issues to the present case. The capital funding decisions made by the Alabama State Legislature, including the reason for the defeat of the bills co-sponsored by the trial judge, were disputed facts as to which two of the principal experts and several A&M witnesses testified. The very deficiencies in A&M's facilities that were itemized as justification for the bill co-sponsored by the trial judge were cited in his opinion as evidence of discriminatory capital funding. The trial court also found that the racial composition of the boards of trustees of A&M and ASU was a vestige of segregation.

The trial judge not only had knowledge of, but was intimately involved in, the determination of the racial composition of the ASU Board of Trustees as well as the A&M facilities appropriation bill. These involvements made it impossible for the trial judge to preside in this case. *See Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446-47 (6th Cir. 1980). Regardless of whether the trial judge's activities were typical of those of state legislators, his active participation "in the very events and . . . the very facts that are at issue in this suit," makes his disqualification mandatory.[4] (Petitioners' App. at 23a).

The Court of Appeals was also correct in disqualifying the trial judge on the basis of his involvement as a lawyer in *Lee v. Macon*. The admission into evidence of a report, over Auburn's objection, dealing with the precise factual issues and two specific school systems with which the trial judge dealt as a lawyer in *Lee v. Macon*[5] shows that "Judge Clemon was once again faced with evaluating evidence of which he had special extrajudicial knowledge." Petitioners' App. at 27a. "Whether, in a bench trial, a judge can avoid involvement destructive of impartiality

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[4] *Laird v. Tatum*, 409 U.S. 824 (1972), is inapposite. In that case Justice Rehnquist had no extrajudicial knowledge of relevant facts. 409 U.S. at 827. His only prior involvement with the issues in that case was to report to the Senate his understanding of the law regarding search and seizure. 409 U.S. at 825-826. Prior expression of a legal position is far different from having been involved in the precise facts in dispute.

[5] Having argued successfully at trial that the report was relevant, the Petitioners should now be estopped from resisting recusal by arguing that the report was not relevant.

where he has personal knowledge of material facts in dispute is a question that cannot be answered satisfactorily," *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d at 447.

III. A STATE UNIVERSITY AND ITS BOARD MEMBERS HAVE NO SUBSTANTIVE RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, AND THEREFORE HAVE NO STANDING, TO ASSERT CLAIMS THEREUNDER ON THEIR OWN BEHALF.

Petitioners challenge, for the second time, the opinion authored by Judge Frank M. Johnson in *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1287, 94 L.Ed.2d 144 (1987), that creatures of the state, such as A&M and ASU in the instant case, "may not raise a Fourteenth Amendment claim under Section 1983," Petitioners' App. at 144a; or a claim under Title VI of the Civil Rights Act of 1964. Petitioners' App. at 144a-46a. Certiorari was first denied as to this issue in Case No. 86-749.

Judge Johnson's opinion addressed only the standing of ASU to assert claims challenging State Board of Education regulations setting minimum standards for certification of teacher-education programs. The *per curiam* opinion of Judges Vance, Kravitch and Brown extended Judge Johnson's holding to the claims of ASU which sought to maintain "the seniority of Alabama State University as an autonomous, full-service senior institution," and of A&M, which sought similar relief based on its

status as "a traditionally black institution of higher education." Appendix at A-1; A-5-6; A-7.

In support of their argument that A&M and ASU have standing under 42 U.S.C. § 1983 and Title VI, the Petitioners cite a line of cases holding that local school boards may have standing to assert the rights of their students and faculty because the school board members have been placed in a position of either violating state law or the constitutional rights of their students or faculty. *See Board of Education v. Allen ("Allen")*, 392 U.S. 236, 241 n.5 (1968); *Akron Board of Education v. State Board of Education* ("*Akron*"), 490 F.2d 1285, 1290 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974); *Brewer v. Hoxie School District No. 46 ("Hoxie")*, 238 F.2d 91 (8th Cir. 1956).

Unlike the plaintiffs in the cases cited by Petitioners, however, A&M and ASU are not in the position of resisting a state law which they allege will force them to take action that will *increase* segregation. *See Allen* at 241, n.5; *Akron* at 1290; *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). The members of their boards of trustees are not claiming that actions of the state have put them in a position of either violating state law or the constitutional rights of their students. To the contrary, they have alleged that they have done everything in their power to desegregate, but that as traditionally black institutions they are entitled to preference in facilities, funding and programs. Where the conflict between adherence to state law and constitutional duty is absent, so is the basis for standing annunciated in *Allen* and its progeny. *Compare Allen, supra, and Akron, supra, with Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 998 (6th

Cir. 1987) *and City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 237 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980) *and School District of Kansas City v. State of Missouri*, 460 F. Supp. 421, 440 (W.D. Mo. 1978).

A party's standing "must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively. . . ." *Thomas v. Board of Trustees*, 195 U.S. 207, 210 (1904); *accord Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.") ASU's and A&M's failure to assert the rights of their students or faculty in the district court precludes their claim of representative standing on appeal. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 89 L.Ed.2d 501, 516, 106 S. Ct. 1326 (1986).

The Court of Appeals squarely considered A&M's and ASU's claims to institutional rights under the equal protection clause and Title VI and correctly rejected them. *See Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor And City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *City of Newark v. New Jersey*, 262 U.S. 192 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 638, 4 L.Ed. 629 (1819). The claims asserted by A&M and

ASU in the trial court were designed to protect institutional interests of A&M and ASU, not the constitutional rights of their students or faculty. The Court of Appeals was correct in holding that A&M and ASU had no such right under the Fourteenth Amendment or Title VI, and therefore no standing to assert those claims. *See Kelley v. Metropolitan County Bd. of Educ., supra; Randolph County v. Alabama Power Co.*, 784 F.2d 1067 (11th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3473, 107 S. Ct. 878, 93 L.Ed.2d 833 (1987); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Delta Special School District No. 5 v. State Board of Education*, 745 F.2d 532 (8th Cir. 1984); *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n.3 (3d Cir. 1981) (*en banc*); *Village of Arlington Hts. v. Regional Transportation Auth.*, 653 F.2d 1149 (7th Cir. 1981); *Appling County v. Municipal Elec. Auth. of Ga.*, 621 F.2d 1301, 1308 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980); *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976); *City of New York v. Richardson*, 473 F.2d 923 (2d Cir.), *cert. denied, sub nom. Lavine v. Lindsay*, 412 U.S. 950 (1973).

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CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
vs.	)	CV-83-C-1676-S
	)	
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia*, that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State

University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth

herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD
By: /s/ SOLOMON S. SEAY, JR.

Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama 36104
(205) 269-2563
Attorney for Board of Trustees
for Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of the same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

Ira Dement
Dement & Wise
P. O. Box 4163
Montgomery, Alabama 36101

FOR: George C. Wallace
The Alabama Commission on Higher Education
The State of Alabama
The Alabama Public School and College Authority

Glenn Powell
P. O. Box 295
Tuscaloosa, Alabama 35401
and
Paul Skidmore
P. O. Box 6233
University, Alabama 35486

FOR: The University of Alabama

Charles Coody
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, Alabama 36130

FOR: Wayne Teague
Alabama State Board of
Education

Thomas Thagard
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Montgomery, Alabama 36101
and
Edward Allen
Balch, Bingham, Baker, Ward,
Smith, Bowman & Thagard
P. O. Box 306
Birmingham, Alabama 35201

FOR: Auburn University

Walter Merrill
500 First National Bank
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Anniston, Alabama 36201

FOR: Jacksonville State
University

J. Frederic Ingram
William F. Murray, Jr.
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203

FOR: Livingston University

Joe R. Whatley, Jr.
Donald W. Stewart
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Whatley
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FOR: Alabama A&M
University

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FOR: Troy State University

Frank Ellis, Jr.
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FOR: The University of
Montevallo

Robert Potts
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FOR: The University of
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Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D. C. 20530

FOR: The University of
South Alabama

/s/ Solomon S. Seay, Jr.

EXHIBIT 1

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

Agenda Item #6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
v.	)	CV 83-C-1676-S
	)	
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

MOTION TO REALIGN OR IN THE ALTERNATIVE
FOR LEAVE TO FILE CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama

A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* In addition to the relief requested herein and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

STEWART, FALKENBERRY
& WHATLEY
Suite 305, 2100 16th Avenue
South
Birmingham, AL 35205
(205) 933-0300

By /s/ JOE R. WHATLEY, JR.

Joe R. Whatley, Jr.

/s/ DONALD W. STEWART

Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this 25th day of July, 1983:

Ira Dement, Esquire
Dement & Wise
P. O. Box 4163
Montgomery, Alabama 36101

For: George C. Wallace
The Alabama Commission on Higher Education
The State of Alabama
The Alabama Public School and College Authority

Glenn Powell, Esquire
P. O. Box 295
Tuscaloosa, Alabama 35401

For: The University of Alabama

Charles Coody, Esquire
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, Alabama 36130

For: Wayne Teague
Alabama State Board of Education

Solomon Seay, Jr., Esquire
Gray, Seay & Langford
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For: The Board of Trustees for Alabama State University

Thomas Thagard, Esquire
P. O. Box 78
Montgomery, Alabama 36101

For: Auburn University

Walter Merrill, Esquire
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Anniston, Alabama 36201

For: Jacksonville State University

Fred Ingram, Esquire
Thomas, Taliaferro, Forman, Burr & Murray
1600 Bank for Savings Bldg.
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For: Livingston University

Richard F. Calhoun, Esquire
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For: Troy State University

Frank Ellis, Jr., Esquire
P. O. Box 587
Columbiana, Alabama 35051

For: The University of Montevallo

Robert Potts, Esquire
107 East College Street
Florence, Alabama 35630

For: The University of North Alabama

Maxey Roberts, Esquire
The University of South Alabama
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For: The University of South Alabama

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Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Section
Civil Rights Division
Department of Justice
Washington, DC 20530

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.